Supreme Court, U.S.
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No. 09-1424

IN THE

Supreme Court of the United States

LINKCO, INC.,

Petitioner,

v.

NAOYUKI AKIKUSA AND FUJITSU LIMITED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

ROBERT N. HOCHMAN*
RICHARD J. O'BRIEN
PAUL E. VEITH
TACY F. FLINT
SIDLEY AUSTIN LLP
One S. Dearborn Street
Chicago, IL 60603
(312) 853-7000
rhochman@sidley.com

Counsel for Respondents

*Counsel of Record

June 24, 2010

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

(1) Whether the district court and Second Circuit properly held that LinkCo's complaint does not allege any attorney misconduct or other matter that would support an independent action for fraud.

(2) Whether LinkCo's complaint was filed so tardily that it could not be allowed to proceed without undermining both the strict one-year time limit on motions asserting fraud pursuant to Federal Rule of Civil Procedure 60(b)(3) and the principle of finality of judgments.

PARTIES TO THE PROCEEDING

Pursuant to Rule 29.6, Fujitsu Limited states that it has no parent company and that no publicly traded company owns more than 10% of its stock.

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BRIEF IN OPPOSITION

Respondent Fujitsu Limited ("Fujitsu") respectfully submits this brief in opposition to the petition for a writ of certiorari filed by LinkCo, Inc. ("LinkCo").[1]

COUNTERSTATEMENT OF THE CASE

A. Factual Background

LinkCo first brought suit ("*LinkCo I*") against Fujitsu in September 2000, asserting various claims related to Fujitsu's alleged use of LinkCo's supposedly proprietary technology. Pet. App. A9. After claims for trade secret misappropriation, conversion, intentional interference with contract, and a statutory claim under Massachusetts law were all either withdrawn or adjudicated in favor of Fujitsu as a matter of law, a jury returned a verdict in favor of LinkCo as to its sole remaining claim (common law unfair competition) and awarded $3.5 million in damages. *Id.* Before judgment was entered, the parties settled the case, and the suit was dismissed with prejudice by stipulation in 2003. *Id.* at A9-A10.

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[1] Respondent Naoyuki Akikusa has appeared through counsel in this case, but did not join Fujitsu's motion to dismiss. As an individual citizen of Japan, Akikusa has not been properly served under the Hague Convention, and has not waived service. *See* Fed. R. Civ. P. 4(f)(1); Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, art. 1, *et seq.*, *entered into force* Feb. 10, 1969, 20 U.S.T. 361. Although Akikusa did not formally join Fujitsu's motion or this brief, the order dismissing Fujitsu has the effect of foreclosing any possible action against Akikusa, as well. Thus, he was named an appellee in the appellate court's caption, and petitioner has listed him as a respondent.

More than five years later, on October 14, 2008, LinkCo initiated this litigation, an independent action under Federal Rule of Civil Procedure 60(d)(3), claiming that fraud had occurred during *LinkCo I*. Pet. 6. Rule 60(d)(3) allows a district court to "set aside a judgment for fraud on the court" in an independent action. Rule 60(b)(3) similarly allows a district court to "relieve a party or its legal representative from a final judgment, order, or proceeding" because of fraud, but a motion under Rule 60(b)(3) must be filed within one year. Fed. R. Civ. P. 60(c)(1). No express time limit applies to independent actions under Rule 60(d).

Here, the purported fraud included alleged discovery violations by Fujitsu and alleged perjury by Fujitsu witnesses. As summarized by the district court, LinkCo's complaint set forth:

> (1) allegations that documents should have been but were not produced to LinkCo by Fujitsu; (2) allegations that answers to interrogatories either failed to disclose pertinent information or were misleading; (3) allegations that Fujitsu used various web-based tactics to hide critical information from LinkCo; (4) allegations that Fujitsu had failed to identify particular persons as witnesses; (5) allegations that witnesses may have given false testimony; (6) allegations that a non-party assisted Fujitsu in its failure to produce relevant documents; and (7) allegations that Fujitsu may have manipulated the machine translation of a certain Japanese document into English.

Pet. App. A19-A21 (footnotes citing relevant paragraphs in the complaint omitted). Based on this alleged misconduct, LinkCo asked the district court to void the settlement, vacate the voluntary dis-

missal, reinstate the jury verdict of liability, and grant a new trial on damages. *Id.* at A8. Even though LinkCo's trade secret misappropriation claim had been adjudicated in favor of Fujitsu as a matter of law for reasons unrelated to any of the supposed misconduct LinkCo has belatedly alleged, see *LinkCo v. Fujitsu, Ltd.*, 230 F. Supp. 2d 492, 498-500 (S.D.N.Y. 2002), LinkCo nonetheless requested "'a new trial on damages due to misappropriation of trade secrets.'" Pet. App. A8.

B. The Decision of the District Court

LinkCo's fraud claim was assigned to the same district judge who had presided over the initial trial and who was, therefore, familiar with the issues and the overall conduct of the parties throughout the litigation. Even after accepting as true all the allegations in the complaint, and drawing all "reasonable inferences" in LinkCo's favor, Pet. App. A10-A11, A19, the district court dismissed LinkCo's complaint in its entirety.[2] The court provided two independent grounds for dismissal.

First, the court found that the complaint failed to state a claim of "fraud on the court" sufficient to sustain an independent action under Rule 60(d)(3). As the district court explained, "[a] party seeking to vacate a judgment in an independent action must show that permitting the judgment to stand would be a grave miscarriage of justice." Pet. App. A14-A15 (internal quotations omitted) (citing, *inter alia*, *United States* v. *Beggerly*, 524 U.S. 38, 46 (1998)). "'[T]he type of fraud necessary to sustain an independent action attacking the finality of a

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[2] Of course, Fujitsu had assumed the truth of the allegations only for purposes of its motion to dismiss. Fujitsu has not conceded that factual truth of any of LinkCo's allegations.

judgment is narrower in scope than that which is sufficient for relief by timely motion [under Rule 60(b)]." *Id.* at A15 (first alteration in original). Fraud on the court

> "is limited to fraud which seriously affects the integrity of the normal process of adjudication [and] should embrace only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases."

Id. (alteration in original).

In particular, fraud on the court "involves far more than an injury to a single litigant because it threatens the very integrity of the judiciary and the proper administration of justice." Pet. App. A15-A16 (internal quotations omitted). Accordingly, allegations of misconduct by one litigant against another—such as nondisclosure during pretrial discovery, perjury by a witness, or submission of other fabricated evidence—is not fraud on the court. *Id.* at A16. By contrast, actions that defile the court itself—such as "bribing a judge, tampering with a jury, and hiring an attorney for the purpose of influencing a judge"—are fraud on the court. *Id.*

Applying these settled principles of law, the district court determined that LinkCo's complaint failed to state a claim of fraud on the court and thus could not support an independent action under Rule 60(d). The court found that "the allegations in the Second Amended complaint," even if true in light of all the reasonable inferences that could be drawn in LinkCo's favor, "suggest nothing more than a fraud upon a single litigant—LinkCo—rather than a fraud

upon the Court." Pet. App. A19. After painstakingly reviewing LinkCo's "numerous and specific" allegations, the court concluded that the complaint asserted no more than "the possibility of obstruction of discovery and witness perjury," which are insufficient as a matter of law to state a claim under Rule 60(d). *Id.* at A21.

The district court expressly considered and rejected LinkCo's assertion that the complaint alleged any involvement by Fujitsu's counsel in the purported fraud. Once again demonstrating care in reviewing and citing specific allegations in the complaint, the district court explained that LinkCo's complaint "mentions Fujitsu's counsel twice." Pet. App. A21. The district court concluded that "these allegations—without more—do not suggest knowing misconduct by Fujitsu's counsel. The allegations demonstrate only that Kanda [a Fujitsu witness] may have provided false testimony." *Id.* at A22-A23 (footnote omitted). Because the complaint alleged no involvement by Fujitsu's counsel, the district court was not required to, and did not, address whether any such involvement would be sufficient to state a claim of fraud on the court.

The district court's second, independent ground for dismissal was based on the failure of LinkCo to allege facts necessary to support its claim for equitable relief. As the district court reasoned, an independent action could not proceed "because LinkCo has failed to demonstrate that it had no adequate remedy at law or that its 'fault, neglect, or carelessness did not create the situation for which [it] seek[s] equitable relief.'" Pet. App. A25 (alterations in original).

LinkCo's own allegations, if accepted as true, showed that LinkCo had obtained enough information that "it had reason to know Fujitsu had not

acted properly" well within the one-year limit (which ended in April 2004) for filing a Rule 60(b)(3) motion. Pet. App. A28-A29 (discussing allegations that LinkCo claims support its view of Fujitsu's misconduct that came into LinkCo's possession in December 2003 and January 2004); *see also id.* at A25-A28 (describing several aspects of alleged fraud that were discoverable during or within a year of *LinkCo I* proceedings). Indeed, "the complaint alleges that LinkCo actually began investigating Fujitsu's purported manipulation of the litigation process in *LinkCo I* soon after dismissal of the case," within the one-year period during which a motion under Rule 60(b)(3) would have been timely. *Id.* at A28-A29. Many of the documents on which LinkCo was relying in its complaint were publicly available "on the Internet or could have been found in public records." *Id.* at A25.

Further, LinkCo had not only alleged that it had enough information to bring its claim within one year of the settlement, but LinkCo also claimed it had discovered additional evidence as early as September 2005, some three years before this litigation was filed. Pet. App. A30. At that time, LinkCo allegedly presented findings showing misconduct to one of Fujitsu's outside directors. *Id.* (citing September 2005 LinkCo presentation titled "A Conspiracy to Flaunt American Justice by Foreign Executives Right Inside US Federal Court"). The other evidence of misconduct LinkCo allegedly found in 2006 and 2007 was simply cumulative of what it claims to have uncovered before September 2005. *Id.* at A32. Recognizing the prejudice to Fujitsu of reopening a five-and-a-half-year-old judgment, particularly after LinkCo had "inexcusabl[y]" waited more than three years to bring its claim, the court "decline[d] to exercise [its]

discretion to entertain this action pursuant to Rule 60(d)." *Id.* at A33.

C. The Decision of the Second Circuit

In a summary order, the Second Circuit affirmed the district court's decision, finding no abuse of discretion in either of the district court's independent grounds for dismissal of LinkCo's complaint. The Second Circuit concluded that the district court's reading of the complaint as alleging "a fraud upon a single litigant—LinkCo—rather than a fraud upon the court" was proper. Pet. App. A4 ("This conclusion does not manifest 'an erroneous view of the law or ... the evidence[.]'") (omission in original). Because such misconduct against a single litigant cannot support an independent action for fraud on the court, the Second Circuit "[could not] conclude that the district court's decision not to entertain LinkCo's Rule 60(d) claim for fraud falls outside 'the range of permissible decisions.'" *Id.*

Separately, the Second Circuit affirmed the district court's independent conclusion that LinkCo had delayed too long in bringing the suit. The court rejected LinkCo's assertion that it could not have brought suit until after it allegedly obtained additional information in 2006 as "not convincing." Pet. App. A5. The Second Circuit also noted that LinkCo had waived any argument that unclean hands prevented Fujitsu from raising a laches defense. *Id.* at A6 n.2. LinkCo identified no reason why it could not have proceeded with the action years sooner than it did. The Second Circuit held: "We are thus not persuaded on the totality of the record that the district court abused its discretion in finding a lack of diligent pursuit of rights, and we affirm its dismissal of the claim for equitable relief." *Id.* at A6.

REASONS FOR DENYING THE PETITION

LinkCo seeks this Court's review to obtain a third chance to establish that the allegations in its complaint adequately allege attorney involvement in the supposed fraud on the court, and also that its several-years' delay in bringing this suit does not bar its requested relief. The district court and the Second Circuit have both considered and rejected each argument, and neither warrants nor requires an additional layer of review.

The first argument presents no question of law at all, much less one warranting this Court's review. Rather, it merely asks this Court to take a fresh look at LinkCo's complaint and read it differently than the two courts that have already considered the issue. LinkCo does not claim that either court stated or applied an improper legal standard, either as a matter of construing complaints or as a matter of Rule 60 law. LinkCo cannot provide any reason why this Court should engage in such case-specific review. In any event, such review would be futile, as the two previous courts have properly read the complaint.

LinkCo's second argument asks this Court to consider a legal question that the lower courts are not struggling with, and that this case ultimately does not present. Even assuming some degree of difference in how courts of appeals approach the question of laches as applied to claims brought under Rule 60(d)(3), LinkCo delayed for so long that its claim is untimely under any standard. LinkCo could have initiated fraud proceedings within the time to file a motion under Federal Rule of Civil Procedure 60(b)(3). LinkCo cites no decision under similar circumstances allowing a party to proceed with an independent action to vacate a prior judgment on the basis of fraud some five years after the judgment was

entered. To so hold would undermine both the one-year time limit for such motions and the fundamental principle of finality of judgments. Additionally, because LinkCo has failed to state a claim for relief under Rule 60(d)—because its first argument fails—this Court would never even reach the laches question were it to accept review. In sum, this case presents no opportunity to review the application of the doctrine of laches to independent actions for fraud.

I. THIS COURT SHOULD NOT REVIEW WHETHER LINKCO'S COMPLAINT STATES A CLAIM.

LinkCo openly seeks factbound error correction, asking this Court to review whether the district court and the Second Circuit correctly read the complaint when those courts held that LinkCo had failed to state a claim for relief. *See* Pet. i.

LinkCo emphasizes that attorney involvement in fraud can support an independent action. Pet. 9-10. But LinkCo does not and cannot claim that the Second Circuit disagreed. To the contrary, LinkCo acknowledges that it is "well-settled" that "fraudulent conduct by an attorney for a party constitutes a fraud on the court." Pet. 9 (citing cases). And the district court, too, noted that misconduct involving "'officers of the court'" could support a claim for fraud on the court. *See* Pet. App. A16 n.35. That legal principle has never been in doubt in these proceedings.

LinkCo's claim failed because, in the words of the district court, the complaint contains "no allegation of attorney collaboration or involvement in the alleged fraudulent scheme." Pet. App. A21. The Second Circuit agreed that the district court's reading of the complaint was not erroneous. *Id.* at A4. Thus, LinkCo

asks this Court to examine the lower courts' complaint-specific conclusion that LinkCo's complaint identifies no attorney misconduct. Even if there were reason to believe that *both* courts to have considered this factbound question had erred, the question does not satisfy the standards for this Court's review. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Moreover, both courts were correct. The district court described in detail the two allegations in the complaint that referred to Fujitsu's counsel:

> *First*, the Complaint alleges that one of Fujitsu's witnesses, Kiyoto Kanda, had been shown a powerpoint presentation that promoted @DisclosureVision's international scope by Fujitsu's counsel, but that this presentation was never produced in *LinkCo I*. *Second*, the Complaint alleges that Fujitsu's counsel had engaged in an e-mail exchange with Kanda about the date of a meeting at which a particular powerpoint presentation was presented. Kanda had initially believed the November 20, 1997 date on the presentation to be "strange," but two hours later had told counsel that this was the right date, even though LinkCo later discovered that the actual date of the meeting was January 20, 1998.

Pet. App. A21-A22 (footnotes omitted). As the district court properly concluded, "these allegations—without more—do not suggest knowing misconduct by Fujitsu's counsel." *Id.* at A22.

LinkCo's bald assertion that its complaint "contained sufficient allegations to establish a fraud

on the court committed by Fujitsu and Fujitsu's attorneys," Pet. 10, provides no reason to doubt the careful review of the courts below. LinkCo does not and cannot quote or even cite allegations that, if true, establish any involvement in the alleged fraud by Fujitsu's counsel.

Without any adequate allegation of attorney involvement, there is no allegation in this case that rises to the demanding level of asserting a fraud on the court, as opposed to merely asserting a fraud on a particular litigant. Therefore, even accepting LinkCo's allegations as true, which Fujitsu and the courts below have done for purposes of resolving Fujitsu's motion, LinkCo has failed to establish error, much less any error that merits this Court's review.

II. THIS CASE DOES NOT IMPLICATE WHETHER THE DOCTRINE OF LACHES APPLIES TO INDEPENDENT ACTIONS UNDER RULE 60.

LinkCo next asserts that because the Second Circuit affirmed the district court's independent ruling that LinkCo's claim was untimely, the Second Circuit "stands in direct conflict with other Circuits that have held laches does not apply to such claims." Pet. i. But this case simply provides no occasion to consider or resolve any supposed split of authority in the Courts of Appeals. Under no circuit's law would LinkCo's claim survive.

First, as noted above, LinkCo's claim failed primarily because LinkCo failed to state a claim under Rule 60(d). LinkCo's delay in bringing this claim was merely an alternative ground for dismissal. Because LinkCo cannot demonstrate any error in the construction of its complaint, this Court, were it to

accept review, would never reach the legal issue LinkCo purports to present.

Second, even if the Court were able to reach the question, LinkCo delayed so long in filing its claim that it would be deemed untimely by any court. The district court found that LinkCo had sufficient knowledge of the purported fraud to bring it to the court's attention within a year of the *LinkCo I* judgment. Pet. App. A25-A28. LinkCo thus could have proceeded by motion under Rule 60(b)(3), but chose instead to wait more than five years. For a district court to exercise its discretion to countenance such delay would be inconsistent both with the time limit for Rule 60(b)(3) actions and with the fundamental principle of the finality of judgments.

In *United States* v. *Beggerly*, this Court explained that broadly allowing resort to independent actions under Rule 60(d) would nullify "the strict 1-year time limit" on motions under Rule 60(b)(3) and would amount to an improper departure "from rigid adherence to the doctrine of res judicata." 524 U.S. 38, 46 (1998). Likewise, the Tenth Circuit—one of the two courts that LinkCo claims forms the split of authority with the Second Circuit here, Pet. 11-12—has explained that even apart from the doctrine of laches, "unexplained delays" in independent fraud actions "bear on the basic concept of the finality of judgments and the proof." *Bulloch* v. *United States*, 763 F.2d 1115, 1121 (10th Cir. 1985) (en banc). For these reasons, LinkCo's extraordinary delay in this case required dismissal under any standard. To allow the claim to go forward would undermine both respect for the finality of judgments and adherence to the time limits imposed on motions under Rule 60(b)(3). Therefore, to affirm the judgment here, it is

not necessary even to consider whether laches applies to a Rule 60(d) fraud-on-the-court claim.

Further, whatever split exists concerning whether the doctrine of laches may ever be applied in the context of an independent action for fraud under Rule 60(d) is both shallow and stale. In addition to the Second Circuit, the Third and Fifth Circuits have, in the last 40 years, stated that laches applies to independent actions for fraud. *Averbach* v. *Rival Mfg. Co.*, 809 F.2d 1016, 1020 (3d Cir. 1987); *Vandervoort, Sams, Anderson, Alper & Post, P.A.* v. *Vandervoort*, 529 F.2d 424, 426 (5th Cir. 1976) (per curiam). Likewise, the Advisory Committee notes to Rule 60 support the application of laches to independent actions:

> If the right to make a motion is lost by the expiration of the time limits fixed in these rules, the only other procedural remedy is by a new or independent action to set aside a judgment upon those principles which have heretofore been applied in such an action. Where the independent action is resorted to, *the limitations of time are those of laches or statutes of limitations*.

Fed. R. Civ. P. 60 (advisory comm. note) (emphasis added).

The Seventh Circuit has stated that laches does not apply to independent actions, *see In re Whitney-Forbes, Inc.*, 770 F.2d 692, 698 (7th Cir. 1985), while the Tenth Circuit has qualified its suggestion that laches generally does not apply by stating that "unexplained delays bear on the basic concept of the finality of judgments." *Bulloch*, 763 F.2d at 1121. A decades-old difference of opinion among courts of appeals that has not produced a significant number of

cases providing opportunities for further development does not warrant the limited resources of this Court. That is all the more true when, as here, the only reason petitioner provides for resolving the asserted split in its favor is one that the court of appeals deemed waived. LinkCo argues that laches should not apply because Fujitsu has unclean hands because of its alleged fraud. Pet. 12-13. But the Second Circuit determined that LinkCo had waived any argument that unclean hands prevented Fujitsu from raising a laches defense. Pet. App. A6 n.2. Further, for the reasons discussed above, the alternative grounds for affirmance would frustrate this Court's ability to reach the issue even if it accepted review.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

ROBERT N. HOCHMAN*
RICHARD J. O'BRIEN
PAUL E. VEITH
TACY F. FLINT
SIDLEY AUSTIN LLP
One S. Dearborn Street
Chicago, IL 60603
(312) 853-7000
rhochman@sidley.com

Counsel for Respondents

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*Counsel of Record